IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KELVIN CRYOSYSTEMS, INC.,	)	Civil Action
	)	No. 03-CV-00881
Plaintiff	)	
	)	
vs.	)	
	)	
LIGHTNIN, a Division of SPX Corporation,	)	
	)	
Defendant	)	
	)	
vs.	)	
	)	
JOSE P. ARENCIBIA, JR.,	)	
	)	
Third-Party Defendant	)	

* * *

APPEARANCES:
ERV D. MCLAIN, ESQUIRE
On behalf of Plaintiff and Third-Party Defendant

BERNARD H. MASTERS, ESQUIRE
SAMUEL W. SILVER, ESQUIRE
SUZANNE CAMPBELL, ESQUIRE
On behalf of Defendant

* * *

A D J U D I C A T I O N

JAMES KNOLL GARDNER,
United States District Judge

The undersigned presided over a non-jury trial in this matter held November 16, 17 and 18, 2004 and March 23, 2005 on the issues of damages for breach of contract on the counterclaim of defendant Lightnin, a Division of SPX Corporation ("Lightnin"). These damage issues included defendant's claims

for shipping and handling expenses,[1] attorneys' fees,[2] interest and costs and damages on defendant's counterclaim and third-party claim for fraud,[3] including punitive damages, against plaintiff Kelvin Cryosystems, Inc. ("Kelvin") and third-party defendant Jose Arencibia, Jr. ("Arencibia").

We now in find in favor of defendant Lightnin and against plaintiff Kelvin in the amount of $117,115 on defendant's counterclaims, and we find in favor of defendant Lightnin and against third-party defendant Arencibia in the amount of $100,100 on defendant's Third-Party Complaint.

By Memorandum and Order of the undersigned dated November 15, 2004 we granted in part and denied in part Defendant Lightnin's Motion for Summary Judgment. Specifically, we granted defendant's motion for summary judgment on the claims contained in plaintiff's Complaint and dismissed the Complaint.

In addition, we granted summary judgment on defendant's counterclaims against Kelvin for breach of contract and fraud and

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[1] On November 16, 2004, at the commencement of the non-jury trial, defendant withdrew its claim for shipping and handling expenses. (See Notes of Testimony ("N.T.") of the non-jury trial conducted before the undersigned November 16, 2004 at pages 3-4.)

[2] On November 16, 2004, at the commencement of the non-jury trial, defendant withdrew its claim for attorneys' fees in connection with its fraud claims against Kelvin and Mr. Arencibia. However, defendant is pursuing damages in the form of attorneys' fees on its counterclaim for breach of contract. (See N.T., November 16, 2004 at pages 3-4.)

[3] On November 16, 2004, at the commencement of the non-jury trial defendant indicated that it seeks only nominal compensatory damages for its fraud claims. However, defendant is seeking punitive damages on its fraud claims. (See N.T., November 16, 2004 at pages 3-4.)

against Mr. Arencibia for fraud. We awarded defendant $77,015.00 representing the contract price of the goods delivered by defendant to plaintiff. However, we reserved for trial the issues of defendant's entitlement to the other damages enumerated above.

Finally, we denied defendant's claim for quantum meruit as moot.

PROCEDURAL HISTORY

The dispute in this matter involves the sale of an industrial mixer by defendant Lightnin to plaintiff Kelvin for use by Avecia, Ltd., a pharmaceutical manufacturer. As noted above, by Memorandum and Order dated of the undersigned dated November 15, 2004, we granted in part and denied in part Defendant Lightnin's Motion for Summary Judgment dismissing plaintiff's claims for breach of contract and granting partial summary judgment on defendant's counterclaims for breach of contract and fraud against Kelvin and Lightnin's third-party claim for fraud against Mr. Arencibia.

On November 16, 17 and 18, 2004 and March 23, 2005 we conducted a non-jury trial in this matter. Because we had previously granted partial summary judgment to defendant on its counterclaims and third-party claim, the issues to be resolved at trial were limited to additional damages and the issue of what constituted the contract between Kelvin and Lightnin.

At trial, two witnesses testified. Lightnin called Andrew J. Creathorn, Vice-President of Operations for the United Kingdom for defendant's parent company SPX Corporation. In addition, defendant called as of cross-examination third-party defendant Jose P. Arencibia, Jr., the Vice-President, Chief Technology Officer and sole shareholder of plaintiff Kelvin Cryosystems, Inc. Plaintiff also called Mr. Arencibia. Defendant offered six exhibits and plaintiff and third-party defendant jointly offered 13 exhibits.

On December 15, 2004 the parties each filed post-trial briefs. On December 20, 2004 defendant Lightnin filed a reply brief to the post-trial brief of Mr. Arencibia and Kelvin. On March 23, 2005 closing arguments were conducted before the undersigned.

FINDINGS OF FACT

Based upon the testimony and evidence adduced at trial,[4] the pleadings, record papers, the parties' post-trial submissions and the factual determinations contained in our

[4] Our Findings of Fact reflect our credibility determinations regarding the testimony and evidence presented at trial. Credibility determinations are within the sole province of the finder of fact, in this case the court. Fed.R.Civ.P. 52; See, e.g. Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 715, 106 S.Ct. 1527, 1530, 89 L.Ed.2d 739, 745 (1986). Implicit in our findings is the conclusion that we found the testimony of both witnesses credible in part, and have rejected portions of each of their testimony as more fully explained in our discussion.

November 15, 2004 Memorandum,[5] we make the following Findings of Fact.

Breach of Contract

1. On December 7, 2000 plaintiff sent to defendant's agent, Rolf Jacobsen, Confidential Purchase Order Number 001201-2155.

2. Defendant agreed with some, but not all of the terms and conditions set forth in Purchase Order Number 2155.

3. Defendant, by Brad Larsen, a contract Manager at Lightnin, and through Mr. Jacobsen, provided a written set of requested revisions to plaintiff's proposed contract.

4. On December 15, 2000 Bradley Larsen and Jose Arencibia, Jr. spoke about the requested revisions to the plaintiff's purchase order.

5. Mr. Larson and Mr. Arencibia did not come to agreement on the disputed terms contained in the purchase order.

6. On December 21, 2000 plaintiff issued Purchase Order Number 001201-2155/Addendum No. 1 ("the revised Purchase Order").

7. Defendant never signed the Revised Purchase Order.

8. In late December defendant sent plaintiff proposed drawings and specifications for the industrial mixer.

9. The drawings and specifications were not accompanied by an Order Acknowledgment as asserted by defendant.

10. On January 11, 2001 plaintiff returned to defendant a signed approval of the drawings and specifications

[5] The factual findings contained in our November 15, 2004 Memorandum disposing of defendant's motion for summary judgment were based upon the record papers, affidavits, exhibits depositions, defendant's concise statement of facts that were not opposed and on plaintiff and third-party defendant's deemed admissions. At trial, Erv. D. McLain, Esquire counsel for Kelvin and Mr. Arencibia repeatedly maintained that they were not contesting those factual findings for the purpose of the damages trial. Accordingly, we adopt and make a part hereof the factual findings on pages 7-18 of our November 15, 2004 Memorandum.

for the industrial mixer.

11. On January 11, 2001 the parties entered into a contract for the manufacture of an industrial mixer by defendant.

12. The terms agreed to by both parties constituting a contract for the manufacture of the industrial mixer are as follows:

A. The Drawings and Specifications for the construction of the industrial mixer executed on January 11, 2001.[6]

B. The terms under the headings: “PURCHASE P.O. NUMBER", “PROJECT NUMBER”, “VENDOR”, “SHIP TO”, “BILL TO”, “PAYMENT TERMS”, “TAX STATUS” and “INVOICING INFORMATION”, numbers 1-5 contained on Page 1 of the Confidential Purchase Order of Kelvin Cryosystems, Inc., dated December 1, 2000.[7]

C. The terms under the headings: “INVOICING INFORMATION”, numbers 6 and 7, “DELIVERY”, “FREIGHT”, “ADDITIONAL SHIPPING INSTRUCTIONS”, “WARRANTY” and “SCOPE OF SUPPLY”, including the subheading “Motor”[8], contained on Page 2 of the Confidential Purchase Order of Kelvin Cryosystems, Inc., dated December 1, 2000.[9]

D. The terms under the subheadings: “Housing”, “Shaft”, “Impellers”, “Mechanical Seal”, “Material”, “Mounting”, “Speed Transmitter” and the first, third and fourth sentences under the subheading “Other Deliverables” contained on Page 3 of the Confidential Purchase Order of Kelvin Cryosystems, Inc., dated December 1, 2000.

E. The price term of $77,015 expressed on page 4 of Confidential Purchase Order, Addendum Number 01 dated December 19, 2001.[10]

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[6] See Plaintiff’s Exhibit 36, pages 2-4.

[7] Plaintiff’s Exhibit 27, page 1.

[8] The subheading “Motor” begins on page 2 and final word “standard” is contained on page 3 of the purchase order.

[9] Plaintiff’s Exhibit 27, page 3.

[10] Plaintiff’s Exhibit 33, page 4.

F. The terms listed under the section “COMMERCIAL TERMS AND CONDITIONS”, numbers 1, 2, 3, 4, 7, 10, 11, 13, 15, 16, 18, 19 and 20 contained on Pages 4 and 5 of the Confidential Purchase Order of Kelvin Cryosystems, Inc., dated December 1, 2000.

13. The contract between the parties does not include the terms and conditions contained on the back of the Order Acknowledgments or the Invoices sent by defendant to plaintiff.

14. Defendant delivered the industrial mixer to plaintiff.

15. Plaintiff has not paid for the industrial mixer.

Fraud

16. On October 28, 2002 plaintiff issued an Invoice to defendant requesting payment in the amount of $168,914.46 for alleged costs associated with “cure” of the industrial mixer.

17. The Invoice was personally composed and approved by Jose P. Arencibia, Jr. in his capacity as Vice-President of Kelvin.

18. On October 28, 2002 plaintiff issued a back-up document containing line-item amounts for which plaintiff sought to recover $124,202 in costs associated with the alleged “cure” of a replacement industrial mixer.

19. Plaintiff issued the October 28, 2002 Invoice and Back-up document in bad faith.

20. Plaintiff continued to send monthly Invoices to defendant until the time of trial.

21. Defendant relied upon the original Invoice and Back-up document sent by plaintiff as accurate.

22. Defendant, through its employees expended time and effort to verify the validity of plaintiff’s Invoice.

23. Plaintiff admitted that the expenses listed on the Invoice have not been incurred.

24. Plaintiff and Mr. Arencibia intentionally misrepresented the damages that were incurred to “cure”

defendant's alleged breach of contract.

25. Defendant suffered nominal damages for its efforts to investigate plaintiff's fraudulent Invoice and Back-up document.

CONCLUSIONS OF LAW

1. Plaintiff breached its contractual obligation to defendant to pay for the industrial mixer.

2. Defendant is entitled to judgment for the amount of the contract price in the sum of $77,015.

3. Defendant is entitled to interest on the amount of the contract price from November 15, 2004 at the Pennsylvania statutory interest rate.

4. Defendant is not entitled to attorneys' fees and costs in this action.

5. Kelvin Cryosystems, Inc. and Jose P. Arencibia, Jr. fraudulently issued the Invoice and Back-up document to defendant.

5. Defendant is entitled to judgment in the amount of $100.00 constituting compensatory damages for the fraud perpetrated by Kelvin Cryosystems, Inc. and Jose P. Arencibia, Jr.

6. Defendant is entitled to judgment in the amount of $100,000 constituting punitive damages for the fraud perpetrated by Kelvin Cryosystems, Inc. and Jose P. Arencibia, Jr.

DISCUSSION

Breach of Contract

In our November 15, 2004 Memorandum and Order we granted defendant's motion for summary judgment. Specifically, we granted defendant's counterclaim for breach of contract and awarded defendant $77,015.00 representing the contract price for the goods delivered by defendant to plaintiff. We reserved for

trial the issues of defendant's entitlement to shipping and handling expenses, attorneys' fees, interest and costs regarding its breach of contract counterclaim. At trial, defendant withdrew its claim for shipping and handling costs.

Accordingly, the only issues remaining for resolution (1) are what constitutes the contract between the parties; (2) whether the contract terms include an agreement that defendant is entitled to attorneys' fees and costs; and (3) what measure of interest defendant is entitled to.

In our November 15, 2004 Memorandum we concluded that this action was governed by the law of the Commonwealth of Pennsylvania.[11] Furthermore, in our November 15, 2004 decision we concluded that it is clear that there is a contract between the parties for the sale of an industrial mixer. This good was specially manufactured to agreed-upon specifications in a document separate and apart from the other documents the parties each contend make up the terms of the contract. Moreover, neither party disputes the price of $77,015 for the manufacture of the mixer.

Under Pennsylvania law, defendant has the burden of proof on its counterclaim to prove by a preponderance of the evidence the existence of the contract to which plaintiff is a party and the terms of the contract. Viso v. Werner, 471 Pa. 42,

[11] See November 15, 2004 Memorandum at pages 20-23.

369 A.2d 1185 (1977). The test for enforceability of an agreement is whether both parties have manifested an intention to be bound by its terms and whether the terms are sufficiently definite to be specifically enforced. ATACS Corporation v. Trans World Communications, Inc., 155 F.3d 659, 665 (3d Cir. 1998).

Therefore, applying Pennsylvania law, we look to: (1) whether both parties manifested an intention to be bound by the agreement; (2) whether the terms of the agreement are sufficiently definite to be enforced; and (3) whether there was consideration. 155 F.3d at 666; Johnson the Florist, Inc. v. Tedco Construction Corporation, 441 Pa.Super. 281, 657 A.2d 511 (1995).

Plaintiff's Contentions

Plaintiff contends that the contract between the parties consists of a number of documents including Plaintiff's Exhibits 27, 28, 30, 31, 32, 33 and 36. Plaintiff contends that these documents represent the offer, counter-offer and acceptance confirmed by the sign-off by Kelvin on the plans and specifications on January 11, 2001.

Plaintiff asserts that on December 7, 2000 plaintiff sent to defendant's agent, Rolf Jacobsen, Confidential Purchase Order Number 001201-2155. This document indicated the terms and conditions that plaintiff proposed for the contract for the construction of the mixer. At trial, Mr. Arencibia testified

that within two hours of receipt of the original purchase order, Kelvin had received contact from Lightnin regarding the acceptability of certain portions of the P.O. under the heading "Scope of Supply" and the price term.[12] We find this testimony credible.

On December 14, 2000, Mr. Jacobson sent to Mr. Willman a copy of a letter address to Mr. Jacobson from Bradley Larsen, Contract Manager for Lightnin. The letter stated in pertinent part:

> Rolf,
>
> I have been reviewing the new order for Kelvin Cryosystems and everything looks good except for the T&C's. The OS&P marks Lightnin standards, however, the P.O. has customer specific T&C's included. I have reviewed the Customer T&C's and the following issues we need to address with them before LIGHTNIN can acknowledge/sign/accept the Purchase Order.

Plaintiff's Exhibit 30, page 2.

The letter went on to identify seven specific areas contained in the Commercial Terms and Conditions section of the plaintiff's original purchase order that Lightnin disputed. The specific terms and conditions involved: Number 5 Invoices and Discount; Number 6 Delivery; Number 8 Termination or Cancellation; Number 9 Laws and Regulations; Number 12 Warranties; Number 14 Indemnity; and Number 17 Governing Law.

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[12] See Notes of Testimony ("N.T.") of the non-jury trial conducted before the undersigned on November 17, 2004 at pages 189-191.

Defendant's Contentions

Defendant contends that the contract between the parties consists of a number of successive Order Acknowledgments and Invoices that were sent from Lightnin to Kelvin over a period of four months before the mixer was delivered. Defendant further contends that each of these Order Acknowledgments and Invoices contained its standard terms and conditions on the reverse sides.

The standard terms and conditions on the Lightnin Order Acknowledgments and Invoices provide for the payment of "[a]ny legal or collection expenses we may incur due to Buyer's default in payment shall be borne by the Buyer." In addition, defendants standard terms and conditions included a provision that: "A monthly service charge equal to 1½% or the maximum allowable by law, whichever is lower, will be charged if not paid within 30 days of invoice date."[13]

At trial, Andrew Creathorn testified on behalf of defendant that on December 14, 2000 defendant internally processed the order for the industrial mixer. He further testified that when a purchase order comes into Lightnin, information with respect to the purchase order is entered into the "ERP" system, which is Lightnin's electronic record-keeping system. Once the information is inputted into the system and Order acknowledgment is generated. That Order Acknowledgment is

[13] See Defendant's Exhibit 32.

reviewed to determine that it is correct and then the same document is generated and sent to the customer.[14]

Moreover, Mr. Creathorn testified that on or about December 15, 2000 the technical drawings and specifications were generated and sent to plaintiff. Mr. Creathorn further testified that an Order Acknowledgment is usually generated and attached to the drawings and specifications.

However, in this case, Lightnin did not produce either in discovery or at trial the Order Acknowledgment that was allegedly sent with the drawings and specifications. Plaintiff disputes ever receiving an Order Acknowledgment with the drawings and specifications.[15]

Finally, Mr. Creathorn testified that on January 11, 2001 defendant was in a position to manufacture the mixer upon defendant receiving from plaintiff a signed approval of the technical drawings and specifications.[16]

Defendant argues that because plaintiff's purchase order contained express language that required defendant to sign and return the purchase order before it became valid, and because defendant never signed the purchase order, the purchase order is not the contract between the parties and that the Order

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[14] N.T., November 17, 2004 at pages 62-65.

[15] N.T., November 17, 2004, page 78.

[16] N.T., November 17, 2004, page 72.

Acknowledgments and Invoices constitute the contract between the parties.

On the contrary, plaintiff contends that it never received any Order Acknowledgment from defendant prior to the completion of the contract on January 11, 2001. Furthermore, plaintiff asserts that because all Invoices and other Order Acknowledgments sent by defendant were sent after January 11, 2001, these cannot be construed to be part of the contract. For the following reasons, we agree with plaintiff in part, disagree with defendants and conclude that what constitutes the contract between the parties is those terms that were expressly agreed to by the parties.

Initially, we must look at the evidence to determine whether both parties manifested an intention to be bound by the agreement. We note that the only documents signed by either party are the technical drawings and specifications for the mixer and the original and revised purchase orders. The original purchase order dated December 1, 2000 was signed by Mr. Willman. The revised purchase order dated December 19, 2000 was signed by both Mr. Willman and Mr. Arencibia. On January 11, 2001, plaintiff's representative Grant Willman signed the drawings and specifications. However, we conclude that this is not the only indication of the parties intent to be bound by the agreement.

We conclude that based upon the December 14, 2000 letter from Bradley Larsen that the only terms that Lightnin disputed in plaintiff's original purchase order are the terms specifically set forth as disputed in the letter. Specifically, the letter states "everything looks good except for the T&C's". Mr. Larsen's letter explicitly delineates the areas that were not agreed to by Lightnin. Based upon this letter and the Lightnin's previous agreement that the terms under the "Scope of Supply" and the price term were acceptable, we conclude that all the terms set forth in the plaintiff's original purchase order except those explicitly objected to were agreed to by Lightnin.[17]

At trial, Mr. Arencibia testified that after receipt of Mr. Jacobson's fax and review of Mr. Larsen's letter, on December 15, 2000 he contacted Mr. Larsen and discussed the requested changes. Mr. Arencibia further testified that on December 15, 2001 he and Mr. Larsen agreed on the disputed terms and that Mr. Arencibia memorialized those agreements in a facsimile to Mr. Larsen later that day. Furthermore, Mr. Arencibia testified that he never heard back from Mr. Larsen indicating that defendant had any problems with the agreed-to

[17] The only other term that was not agreed to by defendant was the requirement of CE certification. CE Certification refers to certain European Union manufacturing standards. In our November 15, 2004 Memorandum we concluded that this was not an express term of the contract, based upon plaintiff's deemed admission that this was not a contract requirement. Accordingly, we do not include that term in the terms of the contract between the parties.

changes.[18] We find Mr. Arencibia's testimony credible in part.

Specifically, we find Mr. Arencibia's testimony credible that he had a conversation with Mr. Larsen and that certain issues were discussed. However, we do not find credible that there were agreements reached on the disputed terms. The exhibits[19] presented by plaintiff do not clearly reflect that there were agreements on the disputed terms.

Moreover, when those allegedly agreed-upon terms were inserted into the revised purchase order, defendant never signed the revised purchase order evincing an intent not to be bound by all the terms contained in the revised purchase order. Accordingly, we conclude that there was no meeting of the minds on the disputed terms even though we find a meeting of the minds on most of the terms contained in the original purchase order.

In addition, based upon both the testimony of Mr. Arencibia and Mr. Creathorn, we conclude that the date that the contract was made in this case was January 11, 2001. This is the date when defendant believed that it had all the information it needed to build this specially manufactured mixer. We conclude that there was no question that the terms of the contract were those terms that had been previously agreed upon, including the price, payment terms, invoicing information, freight, delivery,

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[18] N.T., November 17, 2004 at pages 195-197

[19] See Plaintiff's Exhibits 30 and 32.

scope of supply and the unobjected to Commercial Terms and Conditions contained in plaintiff's original purchase order. All of these terms make the contract sufficiently specific. Moreover, the parties have never disputed the price. Thus, there is sufficient consideration.

Defendant's contention that because it never signed the original or revised purchase order, and because one of the terms of both purchase orders was that it was not effective unless signed is of no import here. We conclude that defendant manifested an intention to be bound by the terms it agreed to in the original purchase order when it decided to manufacture the mixer notwithstanding lack of formal agreement on the remaining disputed terms. Moreover, we conclude that plaintiff waived this remaining provision by permitting defendant to begin construction without a signed purchase order.

Furthermore, we do not find credible Mr. Creathorn's testimony that an Order Acknowledgment was sent by Lightnin to Kelvin with the drawings and specifications. We do find credible the testimony of Mr. Arencibia that an Order Acknowledgment was not a part of the drawings and specifications that were sent to Kelvin.

It may very well be the usual practice of Lightnin to send such and Order Acknowledgment, but in this case, defendant provides no proof that it was actually done. Defendant was able

to provide every other Invoice and Order Acknowledgment except the one that it claims would constitute additional terms to the contract. Accordingly, we conclude that no Order Acknowledgment was sent with the technical drawings and specifications.

In addition, we are persuaded that defendant considered the terms to which it assented in the original purchase offer to be operative as forming part of the contract between the parties because all of the Order Acknowledgments and Invoices generated by defendant and sent to plaintiff after January 11, 2001 contained reference to the original purchase order on those particular documents.

If the plaintiff's original purchase order was of no effect in this matter as advanced by defendant, there would be no reason to continually reference the purchase order in every subsequent Invoice and Order Acknowledgment. Accordingly, we conclude that this is additional evidence of defendant's assent to those terms contained in the original purchase order that were not expressly rejected.

In applying Pennsylvania law, we conclude both parties manifested an intention to be bound by the agreement; the terms of the agreement are sufficiently definite to be enforced; and there was adequate consideration. Johnson, 441 Pa.Super. 281, 657 A.2d 511.

The fact that the parties did not agree on all the terms of the contract is not fatal to our determination that there is a contract in this matter. It is well-settled that in contract law an agreement with open terms may nevertheless constitute an enforceable contract. See Carlos R. Leffler Inc. v. Hutter, 696 A.2d 157, 163 (Pa.Super. 1997).

Furthermore, we conclude that defendant's contention that because plaintiff did not object to the terms and conditions contained on the back of Order Acknowledgments and Invoices produced after the formation of the contract on January 11, 2004, that plaintiff is bound by those additional terms and conditions. It is well-settled that silence will not constitute acceptance of an offer in the absence of a duty to speak. Chorba v. Davlisa Enterprises, Inc., 303 Pa.Super. 497, 450 A.2d 36 (1982).

The contract between the parties had already been formed without any mention of any of the additional terms contained on the reverse side of the Order Acknowledgments or Invoices. Defendant may not unilaterally change the agreement of the parties to suit its own whims and desires. If defendant had wanted these additional terms and conditions to be part of the agreement, it should have attempted to negotiate the same with plaintiff.

Finally, it is well-settled under Pennsylvania law that attorneys' fees are only awarded when provided by statute or by a

specific contract provision. Chatham Communications, Inc. v. General Press Corporation, 463 Pa. 292, 300-301, 304 A.2d 837, 842 (1975). In this case, because we have determined that the contract between the parties does not contain a provision for payment of attorneys' fees and costs, and defendant has not asserted that it is entitled to attorneys' fees pursuant to any statute, we conclude defendant is not entitled to the attorneys' fees and cost as an item of damages.

In addition, because we conclude that there is no specific contract provision regarding interest on the overdue contract price, defendant is only entitled to the Pennsylvania statutory interest rate on its judgment on the contract price.

Fraud

Compensatory Damages

In our November 15, 2004 Memorandum we concluded that defendant had proven by way of deemed admissions all the elements of a cause of action for fraud against Kelvin and Mr. Arencibia for the issuance of the fraudulent Invoice and Back-up document seeking $168,914.46 to "cure" defendant's alleged breach of contract.[20] The elements of a cause of action for fraud under Pennsylvania law are:

> (1) a representation; (2) which is material to the transaction at hand; (3) made falsely,

[20] See November 15, 2004 Memorandum at pages 30-35.

> with knowledge of its falsity or recklessness as to whether it was true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and resulting injury was proximately caused by the reliance.

Gibbs v. Ernst, 538 Pa. 193, 207, 647 A.2d 882, 889 (1994). To prove a claim for fraud, a party must present clear and convincing evidence of such fraud. Snell v. Commonwealth of Pennsylvania, State Examining Board, 490 Pa. 277, 416 A.2d 468 (1980).

The only issue left to be decided here is what injuries defendant suffered which were proximately caused by plaintiff's fraudulent conduct, and what if any amount of damages it has sustained. At trial, defendant conceded that all it sought was nominal damages for the fraud committed by Kelvin and Mr. Arencibia.

At trial, defendant offered the testimony of Mr. Creathorn that he and other employees of Lightnin had spent time and effort investigating the Invoice and Back-up document. The initial efforts to check into the Invoice included verifying with Lightnin's accounting group that there was no outstanding purchase order and meeting with Lightnin's Customer Service Support Team including Rory Heinlein, Bradley Larsen and individuals with Lightnin U.K. (a different company owned by defendant's parent company SPX Corporation) to determine if anyone had any knowledge of this situation.

In addition, Mr. Creathorn arranged to have Lightnin U.K.'s local representative in Scotland visit the end-user Avecia to determine if the mixer had actually been replaced. Finally, Mr. Creathorn was required to provide periodic updates regarding the Invoice to his supervisor during staff meetings.[21]

We find the testimony of Mr. Creathorn on this subject credible. Moreover, we conclude that defendant has proven by clear and convincing evidence that it is entitled to the nominal damages it seeks. Accordingly, we conclude that defendant is entitled to the sum of $100.00 in nominal damages for the time and efforts its employees expended in determining the veracity of plaintiff's fraudulent Invoice and Back-up document.

Fraud

Punitive Damages

In addition to the compensatory damages we have granted defendant for plaintiff's fraduulent Invoice and Back-up document, defendant seeks imposition of punitive damages. In support of its claim, defendant relies on the findings we made in our November 15, 2004 memorandum. Specifically, defendant relies on the following findings:

> On October 28, 2002 Kelvin sent an Invoice to Lightnin requesting payment of $168,914.46. The Invoice includes the signature of Mr. Arencibia.

[21] N.T., November 16, 2004 at pages 19-24; N.T., November 17, 2004 at pages 6-12.

. . .

> In addition, on October 28, 2002, Kelvin issued a backup document referring to KCI Invoice number 02-0063 ("Backup Document"). The Backup Document contains line-item amounts for which Kelvin seeks to recover $124,202 in costs associated with the replacement of the mixer "with a CE-Certified Agitator."[22] The costs allegedly associated with the procurement of a replacement mixer are listed as "tasks" on the Backup Document. The mixer has never been replaced.
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> . . .
>
> Mr. Arencibia personally created the Kelvin Invoice. Kelvin then issued the Invoice to Lightnin. On the day the Invoice was created, Kelvin created the Backup Document, which was signed by Mr. Arencibia in his capacity as a corporate officer of Kelvin. In the cover letter forwarding the Invoice, Mr. Arencibia states that Kelvin is "seeking costs associated with [Kelvin's] cure" of the mixer. However, at the time Kelvin issued the Invoice, Mr. Arencibia knew that Kelvin had not expended $168,914.46 to "cure" the mixer, that the mixer had not in fact been replaced and that Lightnin owed no such amount.[23]
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> . . .
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> Both Mr. Arencibia and Kelvin have admitted that the expenses listed on the Invoice were not actually incurred and that they intentionally misrepresented the damages which Kelvin incurred as a result of

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[22] The term "agitator" is synonymous with an industrial mixer like the mixer in this litigation. See Notes of Testimony of the deposition of Jose P. Arencibia, Jr., September 13, 2003, page 99, lines 2 through 17.

[23] Defendant Lightnin's Statement of Facts in Support of its Motion for Summary Judgment, Exhibit A, number 10; Exhibit B, numbers 17 through 20 and 26; Exhibit C, numbers 15, 19, 23, 39 through 44, 50 and 51.

> Lightnin's alleged breach of contract.[24]
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> . . .
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> Furthermore, Mr. Arencibia has admitted that Kelvin demanded payment from Lightnin for a sum of money that was not due and owing, that Kelvin issued the Invoice in an attempt recover money that was not due and owing, and that both Mr. Arencibia and Kelvin sent the Invoice with the intent that Lightnin rely on the representations contained therein and pay Kelvin $168,914.46.
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> . . .
>
> Kelvin issued the Invoice in bad faith. Mr. Arencibia created and approved the Invoice in bad faith in his capacity as a corporate officer, and Mr. Arencibia signed the Backup Document in bad faith in his capacity as a corporate officer.[25] Upon receipt of the Invoice, Lightnin was led to believe, and at first did believe, that the sums contained in the Invoice represented amounts of money expended by Kelvin to cure Lightnin's alleged non-performance.[26]
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> . . .
>
> Lightnin was also mislead into believing that Kelvin had actually replaced the mixer at Avecia.

See November 15, 2004 Memorandum of the undersigned at pages 13-16.

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[24] Defendant Lightnin's Statement of Facts in Support of its Motion for Summary Judgment, Exhibit A, numbers 12 through 19, 24 through 27; Exhibit B, numbers 17 through 20 and 26; Exhibit C, numbers 15, 19, 23, 39 through 44, and 50 through 54.

[25] Defendant Lightnin's Statement of Facts in Support of its Motion for Summary Judgment, Exhibit B, numbers 10 through 13 and 66; Exhibit C, numbers 28 through 30, 32 and 33.

[26] Defendant Lightnin's Statement of Facts in Support of its Motion for Summary Judgment, Exhibits H, U and V.

In addition, defendant relies on our conclusion that "Mr. Arencibia's conduct constitutes repeated misfeasance, rather than malfeasance, as defined by the Supreme Court of Pennsylvania which subjects him to personal liability for his allegedly tortious actions."[27]

Defendant seeks punitive damages in the amount of $323,887.68, which represents what it says is three times the attempted fraud by Mr. Arencibia and Kelvin against Lightnin.

Kelvin and Mr. Arencibia assert that defendant is not entitled to any award of punitive damages in this matter because their conduct was not extreme, outrageous or based upon any evil motive. On the contrary, they rely upon the testimony of Mr. Arenicibia at trial wherein he explained that the reason for his sending of the Invoice and Back-up document was because he believed that the mixer contains an alleged systematic technical flaw that could result in the death or injury of innocent persons.

Mr. Arencibia further testified that he was concerned about possible criminal liability and that the flaw may also apply to at least five other mixers that have been supplied by Lightnin. Finally, Mr. Arencibia testified that he did not believe that Lightnin would listen to his concerns, so he felt compelled to send the Invoice to obtain the money to correct this

[27] November 15, 2004 Memorandum of the undersigned at page 32.

alleged problem.[28]

The Commonwealth of Pennsylvania subscribes to the Restatement (Second) of Torts approach to punitive damages Specifically, punitive damages may awarded for conduct that is outrageous, because of a party's evil motive, or the reckless indifference to the rights of others. Feld v. Merriam, 506 Pa. 383, 485 A.2d 742 (1984). Punitive damages must be based on conduct which is malicious, wanton, reckless, willful or oppressive. Chambers v. Montgomery, 411 Pa. 339, 192 A.2d 355 (1963).

In assessing whether to grant punitive damages, we must look at the act itself together with all the circumstances, the motive of the wrongdoer and the relationship between the parties. The state of mind of the wrongdoer is extremely important and the act or failure to act must be intentional, reckless or malicious. Feld, supra.

"Low awards of compensatory damages may properly support a higher ratio [of punitive damages] than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." BMW of North America, Inc. v. Gore, 517 U.S. 559, 582, 116 S.Ct. 1589, 1602, 134 L.Ed.2d 809, 832 (1996).

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[28] Notes of Testimony ("N.T.") of the non-jury trial conducted before the undersigned November 18, 2004 at pages 23-25.

In this case, we previously concluded that the acts of Kelvin and Mr. Arencibia were done intentionally and in bad faith. Moreover, after listening to Mr. Arencibia's explanation of his conduct, which we find lacking in any modicum of credibility, we conclude that punitive damages are appropriate in this matter.

We note that Mr. Arencibia did not express any remorse for his conduct or provide any assurance that he would refrain from similar conduct in the future. One of the purposes of punitive damages is to help ensure that wrongdoers not only comprehend the wrongfulness of their actions, but to deter future bad conduct. Kirkbride v. Lisbon Contractors, Inc., 521 Pa. 97, 555 A.2d 800 (1989). Rather, Mr. Arencibia concocted a completely unbelievable story to attempt to dissuade this court from assessing punitive damages.

We conclude that if Mr. Arencibia truly believed that there was the extreme risk of danger and loss of life and limb because of the unsafe nature of approximately six industrial mixers at various manufacturing plants around the world, he could and should have brought this to the attention of the companies utilizing these mixers. He did not do so. Rather, the first time this story surfaced was at trial which was conducted well over three years after the mixer involved in this suit was delivered to the end-user.

Based upon our previous findings and the testimony of Mr. Arencibia at trial, we conclude that it is appropriate to award punitive damages in the amount of $100,000 in this matter. Mr. Arencibia and Kelvin's conduct in this matter were wanton, willful, intentional and in bad faith. They attempted to procure $168,914.46 by way of the fraudulent Invoice. In addition, they attempted to avert paying the $77,015 contract price that was rightfully due defendant in this matter.

In awarding punitive damages we have taken into account the nature and severity of the wrongdoers' actions in light of all the circumstances in this matter. Moreover, we has looked at the financial situation of both the corporation Kelvin Cryosystems, Inc. and Mr. Arencibia personally. We conclude that $100,000 will serve the public and private interests involved in this matter. Moreover, we award defendant these punitive damages jointly and severally because Mr. Arencibia was acting on behalf of the corporation at the time the Invoice and Back-up document were produced.

CONCLUSION

For the reasons expressed above, we find in favor of Lightnin on its counterclaim for breach of contract against Kelvin Cryosystems, Inc. in the amount of $77,015, plus interest at the Pennsylvania statutory rate from November 15, 2004. In addition, we find in favor of Lightnin and against Kelvin and

Jose P. Arencibia, Jr. on the fraud claims and award Lightnin $100 in compensatory damages and $100,000 in punitive damages.

KELVIN CRYOSYSTEMS, INC.,	)	Civil Action
	)	No. 03-CV-00881
Plaintiff	)	
	)	
vs.	)	
	)	
LIGHTNIN, a Division of	)	
SPX Corporation,	)	
	)	
Defendant	)	
	)	
vs.	)	
	)	
JOSE P. ARENCIBIA, JR.,	)	
	)	
Third-Party Defendant	)	

VERDICT

NOW, this 28th day of September, 2005, upon consideration of the non-jury trial held November 16, 17 and 18 2004 and March 23, 2005; after closing arguments; upon consideration of the testimony and evidence adduced at trial;

upon consideration of the pleadings and record papers; upon consideration of the parties post-trial submissions; and for the reasons expressed in the accompanying Adjudication, including Findings of Fact, Conclusions of Law, and Discussion, we find in favor of defendant Lightnin, a Division of SPX Corporation and against plaintiff Kelvin Cryosystems, Inc. on defendants' counterclaims in the amount of $177,115. We find in favor of defendant Lightnin, a division of SPX Corporation and against third-party defendant Jose Arencibia, Jr. on defendant's third-party complaint in the amount of $100,100.

IT IS FURTHER ORDERED that judgment is granted in favor of defendant Lightnin, a division of SPX Corporation and against plaintiff Kelvin Cryosystems, Inc. on defendant's counterclaim for breach of contract claim.

IT IS FURTHER ORDERED that judgment is granted in favor of defendant Lightnin, a division of SPX Corporation and against plaintiff Kelvin Cryosystems, Inc. on defendant's counterclaim for fraud.

IT IS FURTHER ORDERED that judgment is granted in favor of Lightnin, a division of SPX Corporation and against third-party defendant Jose Arencibia, Jr. on Lightnin's third-party claim for fraud.

IT IS FURTHER ORDERED that judgment is granted in favor of defendant Lightnin, a division of SPX Corporation in the

amount of $177,115 against Kelvin Cryosystems, Inc. and $100,100 against Jose P. Arencibia, Jr.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment in favor of defendant Lightnin, a division of SPX Corporation in the amount of $177,115 against Kelvin Cryosystems, Inc. and in favor of defendant Lightnin, a division of SPX Corporation against Jose P. Arencibia, Jr. in the amount of $100,100.

IT IS FURTHER ORDERED that the Clerk of Court shall mark this matter closed for statistical purposes.

BY THE COURT:

/s/ James Knoll Gardner

James Knoll Gardner

United States District Judge